

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

ORIGINAL

77-1359

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee.

v.

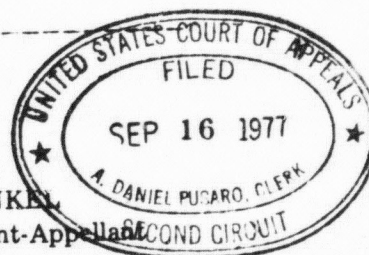
LOUIS MORALES,

Defendant-Appellant.

*On Appeal From The United States District Court
For The Southern District Of New York*

VOLUME II
APPELLANT'S APPENDIX

HAROLD O.N. FRANKEL
Attorney for Defendant-Appellant
253 Broadway
New York, N.Y. 10017
(212) 267-1122



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NOTICE OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- against -

LOUIS MORALES,

Defendant

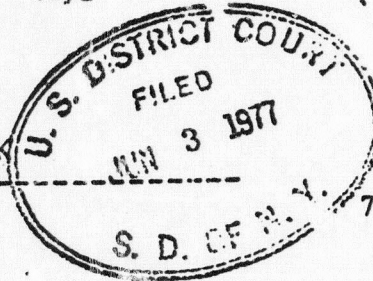
S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of ARNOLD E. WALLACH, sworn to the 3 day of June, 1977, the indictment herein, and upon all the proceedings heretofore had herein, a motion will be made in the above designated Court, before the Honorable Charles E. Stewart, a Justice thereof, at such time and place as the Court may determine, at the Courthouse thereof, Foley Square, Borough of Manhattan, City and State of New York, for an order dismissing the indictment herein, together with such different relief as to this Court may seem just and proper.

Dated: New York, New York
June , 1977

Yours, etc.

ARNOLD E. WALLACH
Attorney for Defendant
Office & P. O. Address
11 Park Place
New York, N.Y. 10007
(212) 227-0959



RECEIVED
CHAMBERS
JUDGE STEWART
JUN 6 1977

77 Cr. 335

(CES)

NOTICE OF MOTION

JUDGE STEWART'S DENIAL OF MOTION DATED JULY 2,
1977

77 Cr.335

Defendant's motions are
denied, including his double
jeopardy claim raised in his June
27, 1977 affidavit. United States v.
United Mine Workers, 330 U.S. 258,
298-99; United States v. Aberbach, 165
F. 2d 713(2d Cir. 1948); Backo v.
Local 281, United Brotherhood of
Carpenters and Joiners, 308 F. Supp.
172, 175(N.D.N.Y.), aff'd, 438 F.2d
176, cert. den. 404 U.S. 858(1971).

SO ORDERED.

Charles Stewart
U.S.D.J.

July 2, 1977

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JM:gdd
-2981

FIRST PAGE OF GOVERNMENT'S OPPOSITION AFFIDAVIT TO DEFENDANT'S
MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA :

- v - :

77 Cr. 335 (CES)

LOUIS MORALES, :

Defendant. :

-----x

GOVERNMENT'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS THE INDICTMENT

Preliminary Statement

Defendant has moved by affidavit pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure ("FRCP") to dismiss the indictment. Defendant moves to dismiss on the grounds that:

- a) A criminal contempt proceeding brought pursuant to 18 U.S.C. § 401(3) and F.R.C.P. Rule 42(b) cannot be commenced by indictment;
- b) The indictment of defendant by the grand jury before which he appeared and refused to testify, and the possible failure to inform the grand jury that defendant was cited for civil contempt, fall outside the bounds of permissible prosecutorial conduct.

This memorandum is submitted by the Government in opposition to defendant's motion to dismiss the indictment.

HEARING | PROCEEDINGS BEFORE HON. JUDGE STEWART ON MAY 20, 1977

1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 -----x

4 UNITED STATES OF AMERICA, :

5 vs. :

77 CR. 335

6 LOUIS MORALES, :

7 Defendant. :

8 -----x

9
10 B e f o r e :

11 HONORABLE CHARLES E. STEWART, JR.,

12 U. S. D. J.

13 New York, New York
14 May 20, 1977 - 11:10 a.m.

15 APPEARANCES:

16 ROBERT B. FISKE, JR., ESQ.,
17 United States Attorney for the
18 Southern District of New York
BY: MICHAEL D. ABZUG, ESQ.,
19 Assistant U. S. Attorney.

20 ARNOLD E. WALLACH, ESQ.,
21 Attorney for the Defendant.
22
23
24
25

1 rsm

2 (Case called.)

3 MR. WALLACH: Your Honor, the United States
4 Attorney did not insist on Mr. Morales' appearance. Hence-
5 forth I told him last week that he either had a right to
6 be present or that I could handle it for him. He preferred
7 to stay away.

8 THE COURT: All right.

9 Well, my principal purpose this morning is to
10 fix a trial date, but I will be glad to consider any other
11 matter.

12 MR. WALLACH: Mr. Abzug should talk first.

13 MR. ABZUG: Go ahead.

14 MR. WALLACH: There are a few legal issues that
15 aren't resolved. Mr. Abzug sent me the Grand Jury testimony,
16 and that's the end of the discovery as to that. However,
17 this is the important thing: I think it is fair to say that
18 Mr. Morales was served with a notice, but his voice was
19 seized, captured by a tape that was the product of a device
20 put into a certain local. When he appeared before the Grand
21 Jury the issue was promptly raised. We went down to Judge
22 Lasker and Judge Lasker reviewed the warrants. I, of course,
23 did not see the warrants. They were not divulged to me.
24 I then sent in a short brief and Judge Lasker did not agree
25 with my arguments about the production of the warrants.

1 rsm

2 He relied, I think, on the famous case in this circuit in
3 re Persico, and there was one that Mr. Abzug succeeded,
4 Millow.

5 The Circuit said that such a stay of the pro-
6 ceeding, namely, the appearance before the Grand Jury, I
7 am not entitled to them, in that the Government says that
8 the electronic surveillance was legal and that satisfies
9 their obligation.

10 About two weeks later, Mr. Morales again appeared,
11 pursuant to the direction of Judge Lasker before the Grand
12 Jury. He refused to respond. Judge McMahon granted a
13 commitment to the Government and Mr. Morales was taken to
14 the -- was incarcerated for civil contempt and held a few
15 days, because apparently the Grand Jury functions were over,
16 and he was released.

17 He was thereafter indicted and arraigned last
18 week, and here we are.

19 I asked Mr. Abzug for the warrants and the
20 supporting papers. We did this orally, and the issue that
21 I think is now before your Honor is am I entitled to them.
22 I am ready to argue that I am.

23 THE COURT: I have a letter from Mr. Abzug.
24 Have you received it?

25 MR. WALLACH: Yes.

1 rsm

2 THE COURT: What is your position?

3 MR. WALLACH: My position, your Honor, is that
4 of *Gelbard v. United States*, which I know is cited day in
5 and day out. It dealt with civil contempt. I think that
6 the concurrence of Mr. Justice White emphasized that we
7 are not entitled to "a full-blown hearing at the grand jury
8 stage because that would disrupt the grand jury proceedings."
9 That has been adjudicated against me and my client went to
10 jail.

11 We now have an indictment for criminal contempt
12 under -- I know your Honor just heard it -- 18 U.S.C. 401.
13 The reasoning of *Gelbard* seems pretty clear to me that we
14 can raise illegal electronic surveillance as a defense to
15 criminal contempt.

16 I do not know of any adjudication that says we
17 cannot. *Gelbard*, the majority of the opinions and the
18 concurrent opinion of Mr. Justice White repeat that it was
19 a civil contempt proceeding and that illegal eavesdropping
20 is a defense to a civil contempt. Of course, the difficulty,
21 the way I understand the cases, is that the Supreme Court
22 of the United States, Mr. Justice Brennan and the others
23 that have joined him assumed that the electronic surveillance
24 was illegal, and from that point on they said it was a
25 defense. But here we have criminal contempt, that is a

1 rsm

2 criminal action and it is not disruptive of any Grand Jury.
3 He has been indicted. We are going to go to trial. Mr. Abzug,
4 I think, is relying on 18 U.S.C. 3504, which says the Govern-
5 ment in any proceeding, et cetera, has to respond as to
6 whether the evidence was obtained illegally. I am relying
7 not on that but on 18 U.S.C. 2515, and I will also cite
8 another statute which I don't see in Gelbard, the Communica-
9 tions Act Section 605. I think it is Title 41.

10 I should have read it. It is Section 605, which
11 says there cannot be any of this unless, or except as pro-
12 vided in the Safe Streets Act Title 3. I am relying on
13 18 U.S.C. 2515 and 2517, as well as the general exclusionary
14 rules.

15 THE COURT: You said you were relying on 2515.
16 What about the other one?

17 MR. WALLACH: I have it here. 18 --

18 THE COURT: 35-something?

19 MR. WALLACH: Yes. 18 U.S.C. 3504. I would
20 like, if I am not interrupting your Honor's perusal of that,
21 I would like to add that I think that the Government in
22 solely relying on 3504 is taking the relevancy of that out
23 of its proper context, because Mr. Justice Brennan in
24 Gelbard scolded Title 3 and cites 2515, and then says that --
25 bear with me a second, I just had it here.

ram

1
2 It says, "Our conclusion that Section 2515 is
3 an available defense to the contempt charge finds additional
4 support in 18 U.S.C. 3504, etc." The citation I have is
5 4133, Lawyers' Edition, Second Series. U.S. v. Gelbard,
6 page 189. The official citation I have is 408 U.S. 41.
7 2515 also is relevant, not 3504.

8 Now, the Government in its letter says nothing
9 was illegal and we are not entitled to it. We did not
10 base the questions, or even I think his appearance on the
11 electronic surveillance.

12 That is all very well and good but, your Honor,
13 I say this very very emphatically, Article III of the
14 Constitution sets up a court to decide questions and cases
15 in controversy. I am not bound by the United States
16 Attorney's adjudication of his case and my client's case.
17 I suggest to your Honor that your Honor has that role, and
18 that just to tell me that I have no claim is a contention
19 and not a ruling. How do I know? I never saw these
20 warrants. I certainly did not see them before Judge Lasker.

21 THE COURT: Let me see if I understand
22 position.

23 You claim that there was some wiretapping here
24 which was illegal and that because of that he wasn't in
25 contempt when he refused to answer the questions before the

1 rsm

2 Grand Jury, is that right?

3 MR. WALLACH: If I said wiretapping, I am
4 inaccurate. It is bugging. I say that under Gelbard we
5 are entitled to raise that issue as a defense and to raise
6 that issue I need the discovery of the warrants and affi-
7 davits and the reports, et cetera.

8 THE COURT: How would you raise the issue?

9 MR. WALLACH: Let's assume the warrants were
10 afforded to me. I can go into the issue of proper cause.

11 THE COURT: Let's assume that the bugging was
12 illegal. What follows from that?

13 MR. WALLACH: The question remains that we have
14 to determine on an evidentiary hearing whether the suppres-
15 sion that flows from that was the cause or was utilized in
16 questioning Mr. Morales, and equally important, whether
17 they found out about Mr. Morales as a result of the sur-
18 veillance.

19 In other words, the knowledge of the identity
20 of a witness or a person that flows from even a bare Fourth
21 Amendment violation can be suppressed. And there is a
22 Second Circuit case, United States v. Tane, and I do not
23 remember the citation, your Honor. But that has held that,
24 I think also in re Huss -- I do not remember that -- that's
25 more recent. They said that the discovery of an identity

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2 of a witness later held in contempt by means of illegal
3 electronic surveillance, they will suppress the identity.

4 Now, I do not say that that is so. I cannot
5 say it is not so. I simply don't know. I am entitled to,
6 if this were a drastic narcotics case, let us say, I would
7 be entitled to those papers.

8 THE COURT: You are suggesting that the first
9 thing I should do is to review what Judge Lasker did and
10 determine whether he was right; is that right?

11 MR. WALLACH: Under Persico and the case -- he
12 was right, I am not entitled to look at them when the man
13 appeared before a Grand Jury. I am not entitled to hear.
14 The Judge decided the issue and said they were perfectly
15 all right. There was no argument from me in that sense,
16 there was none. It would interfere with the Grand Jury.

17 The Grand Jury is no longer playing a role now,
18 except as a witness in the case itself. But I have a right,
19 I would submit, to see if I have a defense to this, because
20 otherwise, Judge, this case, the contempt case, he did not
21 answer the question.

22 THE COURT: What you want is discovery of the
23 papers relating to the bugging so that you can argue to me
24 that Judge Lasker was wrong and that therefore the indictment
25 ought to be dismissed, take it?

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1 rsm

2 MR. WALLACH: Judge, yes. But I just want to
3 say for the record, in deference to you and Judge Lasker,
4 that your Honor would not be reviewing Judge Lasker because
5 Judge Lasker did not have the benefit of my argument, not
6 having seen the warrants.

7 You would be the first judge to preside over a
8 hearing where both sides can proffer their contentions.

9 THE COURT: Judge Lasker saw the warrants?

10 MR. WALLACH: I did not.

11 THE COURT: I understand that. Mr. Abzug, what
12 about this?

13 MR. ABZUG: Your Honor, the Government has no
14 opposition to having your Honor make an in camera review
15 of the order, application and affidavits submitted to Judge
16 Lasker. However, since the Government is not offering the
17 results of any electronic surveillance into evidence at the
18 trial of Mr. Morales, simply because it is not relevant, I
19 do not believe that Mr. Morales has the right to review or
20 to have the Government disclose to him the orders, applica-
21 tions and affidavits. In other words, the Government's
22 position is that Mr. Morales' right of disclosure, since we
23 are not producing the electronic material at the trial, is
24 no greater now than before a Grand Jury.

25 We have a very narrow issue, and that is was

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Mr. Morales lawfully entitled to refuse to answer the questions posed to him at the Grand Jury, despite the order of immunity.

The question, I submit, that your Honor has to determine, assuming it is raised by Mr. Wallach, is whether Mr. Morales had any legal defense at that point, at the stage of the grand jury investigation. One defense that he raised was the legality of the electronic surveillance, but Judge Lasker, after the Government explained that was statutory procedure at that point, ruled against him. If Mr. Wallach wants to argue Judge Lasker's decision, then that's fine and well and good. Your Honor can review the same application, affidavits and orders that Judge Lasker examined to determine their sufficiency in accordance with the statute. But I see no reason, and I see no statutory authority for disclosure of the electronics, the applications, affidavits and orders authorizing the electronic surveillance at this stage.

THE COURT: I think, Mr. Wallach, what you had better do is make your application in writing. I am not entirely clear in my own mind exactly what it is you are asking for at this point. I guess you want to see the underlying papers. Why don't you file your application and I will consider it?

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1
2 MR. WALLACH: Your Honor, may I have a week to
3 do that? I am bogged down with such paper work.

4 THE COURT: Yes. You can have a week. Why
5 don't you plan to file it, you will file it a week from
6 today, which is May 27th.

7 How much time do you want, Mr. Abzug?

8 MR. ABZUG: Could I have until Tuesday to respond,
9 your Honor?

10 THE COURT: Because of my other commitments,
11 I am in no great rush.

12 MR. ABZUG: Wednesday would be fine, then.

13 THE COURT: All right. That's June 1st.

14 MR. WALLACH: Your Honor, may I say something?

15 THE COURT: Yes. To be clear on that, you will
16 file your application on May 27th; and you will respond
17 on June 1st.

18 MR. WALLACH: There is another problem, your
19 Honor. Perhaps I am premature. I know that everybody wants
20 these cases tried quickly. I want to cooperate. There is
21 another, what I consider to be a very grave, problem. I
22 mentioned this to Mr. Abzug. I am not discussing the
23 defendant waiving the jury; what I am discussing is the
24 statute itself, 401, which says the penalty upon conviction
25 is up to your Honor. Now I do know that I am put in the

1 ran

2 position before the case begins of discussing sentencing.
3 If your Honor were to adopt the practice of sentencing this
4 man to less than six months, I would not then be entitled
5 to a jury. Your Honor can conduct this trial and be the
6 sole trier of the fact and the law. If your Honor would
7 sentence this man, if convicted, to more than six months,
8 and I am entitled to it, there has to be a jury trial.

9 So, to be purely candid with your Honor, in this
10 type of case and in view of the time schedule, perhaps it
11 would be desirable to consider this problem so we can know
12 just what is to be done.

13 I am saying that in notice of your schedule,
14 and in notice of the fact that it is summer, etc., because
15 if your Honor were to say if I lose the case, "Sentence him
16 to three months," let's say, then I can't appeal and say,
17 "Well, I wanted a jury trial. If we have a jury trial --

18 THE COURT: Do you have any comment on this,
19 Mr. Abzug?

20 MR. ABZUG: Yes, your Honor. As I understand
21 the rules, your Honor, the jury trial waiver can only be
22 made with the consent of the Government. Ordinarily, we
23 would have no opposition to having your Honor try the case
24 without a jury, except in this case we do, for two reasons:
25 First of all, Mr. Wallach is correct that if the trial

1 rsn

2 proceeds without a jury, you would be limited to sentencing
3 Mr. Morales to only six months, which I do not think is a
4 proper attitude in this case.

5 More importantly, in terms of the economy of
6 time, this is going to be an extremely short trial, your
7 Honor. The Government is only going to call two witnesses
8 and the court reporter and the foreman of the Grand Jury.
9 It should not take, at a maximum, I would say a day and a
10 half. For that reason we would propose a bench trial.

11 THE COURT: You are somewhat premature, in any
12 event, Mr. Wallach, in raising this. Let's keep the question
13 before us and if you want to come back to it, of course you
14 may. As far as a trial date is concerned, I have a criminal
15 case which is presently scheduled to go on trial on June
16 6th, which will take several weeks. The duration of it is
17 uncertain at the moment. Indeed, it is uncertain whether
18 we will in fact begin the trial on June 6th. If that case
19 does go to trial on schedule, I think we could try this case
20 the latter part of July. If that case does not go on trial
21 on schedule we can do it sometime in June.

22 MR. WALLACH: Your Honor, every summer I have
23 this problem -- it is not my vacation. July would be perfect.
24 June is subject to an engagement.

25 THE COURT: I want to find out --

rsm

14

MR. WALLACH: Excuse me, your Honor. I have a personal problem, in that my wife has hay fever.

THE COURT: That's a bad time?

MR. WALLACH: From August 20th until the end of September is bad.

THE COURT: June and July are all right?

MR. WALLACH: I have a case tentatively beginning before Judge Lasker on the 31st of May, which is fine, but now the U. S. Attorney --

THE COURT: I am not going to fix a date now. What about June and July?

MR. ABZUG: That is fine with me. I am leaving the United States Attorney's office on June 9th, so I probably won't try the case.

I am sure that with a case of this duration, they can find someone else.

THE COURT: I would expect to receive your papers.

MR. WALLACH: You will have them next Friday. Thank you very much.

THE COURT: Good afternoon, gentlemen.

(Time noted: 11:30 a.m.)

- - -

DEFENDANT'S MEMORANDUM OF LAW

77 CR 335
(CCES)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- against -

LOUIS MORALES,

Defendant

MEMORANDUM OF LAW

ARNOLD E. WALLACH, ESQ.
Attorney for Defendant
Office & P. O. Address
11 Park Place
New York, New York

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

77-CR. 335
(CES)

- against -

LOUIS MORALES,

Defendant

STATEMENT:

The defendant was indicted for criminal contempt under 18 U.S.C. 401(3). The charge is based on the defendant's refusal to respond to the questions propounded before a Southern District Grand Jury on a prior occasion, after having been granted "immunity", 18 U.S.C. 6002, 6003.

The defendant has now moved for a discovery, seeking to examine all warrants and supporting affidavits and the like, which warrants authorized electronic surveillance. This is under 18 U.S.C. 2510, et seq.

There is no question but that the defendant was told when he appeared before the Grand Jury by the United States Attorney on March 24, 1977 that:

"Now, as I advised you out in the ante-room, these two locations have been subjected to a electronic surveillance. That is, we have bugs in both locations, and have intercepted numerous conversations there. You have been intercepted at the location on 2226 First Avenue. So, I want you to bear that in mind when you come before this Grand Jury next to answer questions." (Minutes of grand jury dated February 24, 1977 at page 4).

On page 18 of the grand jury minutes dated February 24, 1977 the following was told to the defendant by the United States Attorney:

"I do wish to advise you on the record that your conversations were intercepted pursuant to Court authorized electronic surveillance during the Spring of 1976. Specifically, your conversations were intercepted at a social club located at 2226 First Avenue during May and February I believe of 1976."

On page 20 of those minutes, the defendant, relying upon counsel, asked the United States Attorney or the authorities to furnish information as to whether the questioning were based in any way upon evidence acquired through any form of such electronic surveillance. The defendant then requested that the matter be taken before a Court in regard to that issue. The government attorney rather obliquely then told the defendant that he advised him that the conversations were intercepted pursuant to Court order and that other from what the defendant stated, the defendant had every reason to believe his conversations were intercepted, at page 20 minutes of March 24, 1977.

In a letter dated May 18, 1977, there was embodied a refusal by the government attorney to disclose the warrants and the papers in support thereof, authorizing electronic surveillance. The government's letter gave the following reasons:

(a) The warrant and supporting papers were examined "in camera" by Judge Lasker and that Judge Lasker found the same

to be "facially sufficient";

(b) That the government would not be using any results of electronic surveillance at the trial under this indictment;

(c) Then there is the following exact statement made by the government attorney:

"...., apart from the correctness of Judge Lasker's decision which ordered Morales to testify, the legality of that electronic surveillance which might have been used to question your client had he testified before the grand jury as he was lawfully required to do so...., will obviously not be in issue."

It is true that on a prior occasion Judge Lasker examined the electronic surveillance order in camera as proscribed In Re Millow, 529 F. 2d 770, (Cir. 2d, 1976); Re Persico, 491 F. 2d 1156 (Cir. 2d, 1974); Re Buscaglia, 518 F. 2d 77 (Cir. 2d, 1975). It is also a fact that this procedure was utilized in regard to the defendant pending his appearance before the grand jury and the proceedings to prepare a case for civil contempt under 28 U.S.C. 1826.

Upon the defendant's subsequent refusal, after that proceeding to testify, the defendant in due course was jailed for a few days. The defendant was then released it is believed because the investigation before the grand jury terminated.

The indictment herein followed.

The issue now presented is whether the claim of electronic surveillance can be or is a defense to the charge of criminal contempt, rather than civil contempt.

POINT I:

THE DISCLOSURE OF THE ELECTRONIC SURVEILLANCE APPLICATIONS IS WARRANTED SO THAT THE DEFENDANT CAN PREPARE A DEFENSE TO THE CHARGE.

Before reaching the defendant's claim of electronic surveillance and its implementation for a defense, the defense also takes recourse for the discovery and disclosure under Federal Rules of Criminal Procedure 16(a)(1)(A):

"Statement of Defendant. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, ..., exculpatory evidence under the due process clause of the Fifth Amendment to the Federal Constitution also."

The defendant also relies upon Rule 41 of the Federal Rules of Criminal Procedure.

Be that as it may, Gelbard v. U.S., 408 U.S. 41 (1972) would appear to be the guide. This case is cited both in its qualitative aspects, as well as its mode in solving the issue. That case dealt with the petitioner's claim of electronic surveillance as the defense to a claim of civil contempt, as distinguished from criminal contempt which is the issue here. The Supreme Court reasoned that no civil contempt lies where the witness refuses to answer upon just cause and that illegal electronic surveillance could constitute "just cause", at 408 U.S. 45, 46. Next the Court assumed that there was electronic

surveillance, pages 46-47 of 408 U.S. It was held that illegal electronic surveillance including electronic surveillance based on interception not in conformity to the statutory procedures, governing the excessively intrinsic method of investigation, was a defense. That 18 U.S.C. 2515 prohibited the presentation to a grand jury of the compelled testimony of the witness, at 408 U.S. 47. It was further held at pages 48-49 that:

"Hence, although Title III authorized invasions of individual privacy under certain circumstances, the protection of privacy was an overriding Congressional concern. Indeed the Congressional findings articulate clearly the intent to utilize the evidentiary prohibition of Section 2515 to enforce the limitations imposed by Title III upon wire tapping and electronic surveillance..."

On pages 50 and 51 it was stated in part that:

"...No one quarrels with the proposition that the unauthorized use of these techniques by law enforcement agents should be prohibited... Only by striking at all aspects of the problem can privacy be adequately protected. The prohibition, too, must be enforced with all appropriate sanctions. Criminal penalties have their part to play. But other remedies must be afforded to the victim of an unlawful invasion of privacy. Provision must be made for civil recourse for damages. The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings..." (Internal citations and quotations omitted).

"Section 2515 is thus essential to the legislative scheme. Its importance of the protection for the victim of an unlawful invasion of privacy could not be more clear. The purposes of Section 2515 and Title III as a whole would be subverted were the plain command of 2515 ignored when the victim of an illegal interception is called as a witness before a grand jury and asked questions based upon that interception.

"Moreover, Section 2515 serves not only to protect the privacy of communication, but also to ensure that the Courts do not become partners to illegal conduct: the evidentiary prohibition was enacted also to protect the integrity of the Court and administrative proceedings. Consequently, to order a grand jury witness on pain of imprisonment, to disclose evidence that Section 2515 bars in unequivocal terms is both to thwart the Congressional objective of protecting individual privacy by excluding such evidence and to entangle the Courts in the illegal acts of...agents."

On pages 52 it was stated in part that:

"...And, of course Title III makes illegal not only unauthorized interceptions, but also the disclosure and use of information obtained through such interceptions, 18 U.S.C. 2511(1); 18 U.S.C. 2520. Hence, if the prohibition of Section 2515 is not available as a defense to the contempt charge, disclosure through compelled testimony makes the witness the victim, once again, of a federal crime. Finally, recognition of Section 2515 as a defense relieves Judges of the anomalous duty of finding a person in civil contempt for failing to cooperate with the prosecutor in a course of conduct which, if pursued unchecked, could subject the prosecutor himself to heavy civil and criminal penalties... And for a Court, on petition of the executive department to sentence a witness who is herself the victim of the illegal wire tapping, to jail for refusal to participate in the exploitation of that crime in violation of the explicit command of Section 2515 is to stand our whole system of criminal justice on its head..." (Omitting internal quotations and citations).

The Court then buttressed its holding on 18 U.S.C. 3504 stating that:

"Our conclusion that Section 2515 is an available defense to the contempt charge finds additional support in 18 U.S.C. 3504... Section 3504 is explicit confirmation that Congress intended that grand jury witnesses in reliance upon the prohibition of Section 2515 might refuse to answer questions based upon the illegal interception of their communications." (At page 52).

It is submitted, that the sole standard is not 18 U.S.C. 3504 that section merely supplements the prohibition of Section 2515.

It is submitted that the Court also relied on Section 3504 because the particular claim in that case was a defense to "civil" contempt rather than a defense to an indictment charging contempt for refusing to answer before a grand jury. It may be inferred from the majority holding in that case, that the Court was aware that there was a pending grand jury investigation and that the petitioner's resistance could cause delay. That search and seizure issues and suppression issues, were not to be readily had in regard to a witness' refusal to answer before a grand jury as this would cause delay and incorporate conventional issues of suppression attendant to a trial where one is charged with a crime rather than a witness before a grand jury. It is to be noted that in this case Gelbard was not a "defendant" but a witness who refused to respond and was cited for civil contempt.

The concurring opinion of Mr. Justice White commencing at page 69 of 408 U.S. held that:

"Where the Government produces a Court order for the interception, however, and the witness nevertheless demands a full-blown suppression hearing to determine the legality of the Order, there may be room for striking the different accommodation between the due functioning of the grand jury system and the federal wire tap statute. Suppression hearings in these circumstances would result in protractive interruption

of the grand jury proceedings. At the same time, prosecutors and other officers who have been granted and relied on a Court order for the interception would be subject to no liability under the statute, whether the order is valid or not; and, in any event, the deterrent value of excluding the evidence would be margin at least. It is well, therefore, that the Court has left this issue open for considerations by the District Court on remand..."

Mr. Justice White concluded by stating that where the government "officially denies" electronic surveillance of a witness, the matter is foreclosed.

It is respectfully submitted that the procedure adopted by the government at the preceding level namely the in camera inspection of the warrant when the defendant was a grand jury witness, followed the concurring opinion of Mr. Justice White and that the holdings in Persico and Milloy, follow Mr. Justice White's opinion.

Meanwhile the dissent in Gelbard eliminates the problem before the Court. Firstly, it was noted that traditionally, "contempt" actions were brought under the Federal Rules of Criminal Procedure and 18 U.S.C. 401. The latter statute of course is the basis of this indictment. Though it was noted at pages 73-74 of the dissent that:

"...Thus far more difficult inquiry posed by these facts is whether the granting to these petitioners at this particular stage of these proceedings are the sweeping discovery as a prelude to a full hearing on the issue of alleged unlawful surveillance can fairly be inferred..."

It was then continued on pages 73 and 74 that:

"...So far as the reported decisions of this Court and of the lower Federal Courts reveal, prior litigation with respect to grand juries has dealt almost exclusively with questions of privilege, and most of these cases have dealt with the issues of the privilege against self-incrimination. Why it is plain that the respondent in such proceedings was entitled to a hearing and to adduce evidence, it is equally plain that the typical hearing was short in duration and largely devoted to the arguments of counsel on an aggrieved statement of facts."

It was also stated in the dissent, I recite this by way of illustration, that:

"...We deal, therefore, not with the rights of a criminal defendant in the traditional adversary context of a trial, but with the status of a witness summoned to testify before a grand jury devoted in sifting evidence as the result of a presentment of criminal charges..." (At page 75).

Here therefore, Morales is clearly entitled to the discovery because he is not a witness before a grand jury but a defendant in a conventional criminal action based on a federal statute, the action being brought traditionally by a grand jury indictment.

The government's claim that Judge Lasker already ruled, is not relevant to the defense to this action. Judge Lasker did not rule on the basis of an adversary hearing. Judge Lasker ruled only that the warrant was "facially" sufficient. Since the defendant was not shown the warrants, nor the affidavits or other data submitted to procure the warrants, he was hardly in a position to argue that the warrants were not "facially" sufficient. Furthermore, facial sufficiency of the warrant is

not the sole criterion.

18 U.S.C. 2518(10)(a) provides for three standards governing suppression. Those standards are:

"(i) The communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval."

This brings up other issues attendant to suppression of the products of electronic surveillance; minimization, the issue of probable cause, the sealing of the products of the electronic surveillance to insure the authenticity of the tapes, and whether the proper government official authorized the application for electronic surveillance.

In effect, the government is arguing collateral estoppel or res adjudicata. If this is the import, of the government's unarticulated argument, it is submitted there is no collateral estoppel or res adjudicata. Thus, the parties are not the same. In the proceedings heretofore had here, the defendant was not a defendant but a witness before a grand jury and at most a contemnor in a civil proceeding to hold him for contempt. Here he is a defendant because of the grand jury indictment.

Furthermore, the "in camera" inspection of Judge Lasker was limited to facial invalidity, and, the propriety of this course of action by the government would seem, at this stage, to conflict with the holding in Alderman v. U.S., 394 U.S. 165 (1969) at page 181 it being stated:

"The Government concedes that it must disclose to petitioners any surveillance records which are relevant to the decision of this ultimate issue. And it recognizes that this disclosure must be made even though it tended by potential danger to the reputation or safety of third parties...unless the United States would prefer dismissal of a case to disclosure of the information. However, the Government contends that it need not be put to this disclose-or-dismiss option in the instant cases because none of the information obtained from its surveillance was arguably relevant to petitioner's convictions, in the sense that none of the overheard conversations arguably underlay any of the evidence offered in these cases. Although not now insisting that its own evaluation of relevance should be accepted automatically and without judicial scrutiny, the United States urges that the records of the specified conversations be first submitted to the trial judge for an in camera examination. Any record found arguably relevant by the judge would be turned over to the petitioner whose Fourth Amendment rights have been violated, and that petitioner would then have the opportunity to use the disclosed information in his attempt to show that the Government has used tainted evidence to convict him. Material not arguably relevant would not be disclosed to any petitioner."

In not following this argument it was held by the Court at page 182 that:

"..., we conclude that surveillance records as to which any petitioner has standing to object should be turned over to him without being screened in camera by the trial judge. Admittedly, there may be much learned from the electronic surveillance which ultimately contributes nothing to probative evidence. But winnowing this material from those items which might have made a substantial contribution to the case against the petitioner is a task which should not be entrusted wholly to the Court in the first instance. It might be otherwise if the trial judge had only to place the transcript or other records of the surveillance alongside the record evidence and compare the two for texture of the substantive similarities.

Even that aside it would be difficult enough for the trial judge to perform unaided. But a good deal more is involved. An apparently innocent phrase, a chance remark, or reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of the telephone, or even the manner or speaking or using words may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly coalesce and devoid of meaning to anyone unless well acquainted with all the relevant circumstances. Unavoidably, this is a matter of judgment, but in our view the task is too complex, and the margin for error too great, to rely wholly on an in camera judgment of a trial court..."

Furthermore, the government itself in the instances hereinabove cited informed the defendant at his grand jury appearance that there was electronic surveillance. It is submitted this was an invitation to the defendant to test the issue. Having thus invited the defendant to test the issue, the defendant was deprived because of the procedures adopted from contesting the issue of electronic surveillance.

If this were a narcotic case or a perjury case or any one of the myriad cases arising under 18 U.S.C. there is no question that the defendant would have the right to go into the issue of electronic surveillance provided he was qualified as to standing and the like. Because this is a contempt case where there is no statutory limit as to the imprisonment the defendant faces, the defendant is now deprived of this right. The government's assertion that the matter was adjudicated it is submitted, has no weight and furthermore, the government's claim that the questions were not based on electronic surveillance is devoid of any meaning where counsel for the defendant has not been

given the opportunity to contest this claim. The defendant in his appearance before the grand jury took a principled stand. He did not commit perjury and then claim the right of suppression so as to defend against the charge of perjury; see U. S. v. Ceccolini, 542 F. 2d 136 (Cir. 2d, 1976) where a police officer illegally seized or examined a certain paper, it being held that this was an illegal search and seizure. However, the illegal search and seizure provided the basis for a lead which produced testimony at defendant's perjury trial. It was held that the product of the illegal search and seizure had to be suppressed. Certiorari was granted in that case by the United States Supreme Court, No. 76-1151, May 2, 1977.

The defendant thus took a forthright and honest stand. He did not seek to avail himself of the constitutional right and statutory rights given to him by committing perjury or answering any questions so as to test the issue of electronic surveillance. In another context, see U.S. v. Wang, United States Supreme Court, 21 Criminal Law Reporter, 3045, at page 3047 it being stated that:

"...But, as the Court has consistently held, perjury is not a permissible way of objecting to the government's questions. Our legal system provides methods for challenging the government's right to ask questions. Lying is not one of them. ..." (Omitting internal quotations and citations).

Furthermore, the government's ambiguous statement in the letter of May 18, 1977 quoted above, does not constitute a bar to the relief sought. It will be recalled that the government wrote that the legality of the electronic surveillance "which might have been used" to question defendant had he testified was obviously not in issue. The legality of the eavesdropping is a very real issue. Firstly the defendant could not testify because if he did testify or responded to one or two questions he could not avail himself of any objection to answering further questions as this could be deemed a waiver. In other words, a grand jury witness cannot select which questions to answer and choose which questions not to respond to. See Rodgers v. U.S., 340 U.S. 367, at page 371 (1951).

In People v. Mulligan, 40 A.D. 2d 165, 338 N.Y.S. 2d 488, at pages 491-492 it was stated in part that:

"...a Grand Jury witness..., cannot move to suppress evidence in that proceeding should not be required to speculate as to the source of the questions propounded nor to anticipate a criminal contempt indictment. On the contrary, he is entitled to await the formal accusation and service of the required notice before moving for appropriate relief. It is only then that an inquiry can be appropriately made as to whether or not the questions asked by the grand jury were based on information acquired as a result of an improperly issued electronic surveillance order. And if there were, then this defendant cannot be convicted for his refusal to answer any legal and proper interrogatory..." (Omitting internal quotations).

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"...The mere fact that the people have obtained judicial permission to eavesdrop does not, however, preclude a person from being prosecuted criminally from contesting the validity of such permission. To rule otherwise would be tantamount to saying that any search warrant or order for interception is alright if a Judge has seen fit to sign it... Accordingly, we hold that the defendant is entitled to an evidentiary hearing to test the validity of the eavesdropping warrant and that his assertion for such hearing should have been granted."

It is respectfully submitted that the defendant is entitled to a full disclosure of the warrants and all other papers constituting the warrant applications and be afforded a meaningful opportunity to move if he is advised to, in regard to the warrants and the warrant procedure. Aside from any statute contained in Title III that authorizes this, it would seem that this would be affording the defendant procedural due process under the 5th Amendment to the Federal Constitution.

As was stated in Mathews v. Eldridge, 424 U.S. 319 (1976) at page 332:

"Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth...Amendment. ..."

It was further stated on page 334 in part that:

"...Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances... Due process is flexible and calls for such procedural protections as the particular situation demands..." (Omitting internal quotations and citations).

See also Volume XXIX, University of Miami Law Review,
334 et seq., (1975) at pages 362-366.

18 U.S.C. 2518(9) in part provides that:

"The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial,..., unless each party, not less than ten days before the trial... has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved..."

CONCLUSION:

THE RELIEF SOUGHT FOR HEREIN SHOULD BE GRANTED.

Respectfully submitted,

ARNOLD E. WALLACH
Attorney for Defendant

GOVERNMENT'S MEMORANDUM OF LAW

1587
3009
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
UNITED STATES OF AMERICA, :

- v - :

77 Cr. 335 (CES)

LOUIS MORALES, :

Defendant. :

----- -x

MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT'S REQUEST FOR DISCLOSURE
OF ELECTRONIC SURVEILLANCE

Preliminary Statement

At a pre-trial conference held in the above captioned action on May 20, 1977, the Honorable Charles E. Stewart directed defendant through his attorney to apply in writing for whatever relief he sought with respect to the disclosure and/or suppression of electronic surveillance. Defendant subsequently submitted a memorandum moving for discovery of "all warrants and supporting affidavits and the like, which warrants authorized electronic surveillance". Defendant's memorandum, at 1. Defendant moves pursuant to Rules 16(a)(1)(A) and 41 of the Federal Rules of Criminal Procedure ("FRCP"). Id. at 5.

This memorandum is submitted in opposition to defendant's memorandum motion for disclosure of electronic surveillance, and supplements the letter dated May 18, 1977,

from Assistant United States Attorney Michael D. Abzug to defendant's counsel.

Statement of Facts

Defendant was informed by the Assistant United States Attorney on February 24, 1977, when he first appeared before the Grand Jury, that he would be asked questions about defendant's activities and the activities of Anthony "Fat Tony" Salerno and Vincent "Fish" Cafaro in East Harlem and, more specifically, at two locations which had been subjected to electronic surveillance. (Grand Jury minutes of February 24, 1977, at 3-4). Defendant was subsequently advised, on March 24, 1977, that his conversations had been intercepted at a social club located at 2226 First Avenue during the spring of 1976, pursuant to court authorized electronic surveillance. (Grand Jury minutes of March 24, 1977 at 18).

When questioned on this date before the Grand Jury defendant refused to answer on self-incrimination grounds, and read a statement which asked the United States Attorney to furnish information concerning whether any of the questions to be asked him were based upon electronic surveillance, and requesting a judicial investigation of the matter. Id. at 19-20. After informing defendant of Judge Inger B. Wyatt's Order granting him testimonial or use immunity, the Assistant United States Attorney told defendant that the Government

would respond to defendant's question formally before a United States District Court Judge. Id. at 22.

By Order dated April 4, 1977, the Government asked defendant to show cause why he could not be directed to comply with Judge Wyatt's Order of immunity pursuant to 18 U.S.C. §6002 et seq. and testify before the Grand Jury. The Honorable Morris E. Lasker had oral argument on this matter on April 6, 1977, and papers were submitted by the Government and defendant concerning the legality of the electronic surveillance. The Government submitted affidavits indicating that the only electronic surveillance which was directed against defendant, intercepted conversations in which defendant participated, or was conducted on premises in which defendant had a proprietary interest occurred pursuant to an Order dated February 13, 1976 and signed by the Honorable Constance Baker Motley. The Court reviewed these affidavits and examined in camera said electronic surveillance order and its supporting affidavits, and concluded that "all statutory requirements were met" and "no further hearings or inquiry are appropriate". A copy of this memorandum order of the Court, dated April 22, 1977, is attached as Exhibit A to this memorandum.

Despite the Court's Orders granting testimonial immunity and determining that all relevant electronic surveillance was lawful, defendant continued to refuse to

testify and was held in civil contempt. A detailed summary of the facts relating to defendant's refusal to testify and the ensuing indictment is contained in the Government's Memorandum In Opposition to Defendant's Motion to Dismiss the Indictment, which is incorporated herein by reference.

After defendant was indicted for criminal contempt under 18 U.S.C. §401(3), the Government, by letter dated May 18, 1977, addressed to defendant's counsel, refused to disclose to defendant the Orders and supporting papers which authorized the electronic surveillance on the following grounds:

1) The Order and supporting papers had already been examined by Judge Lasker and had been found facially sufficient despite defendant's challenges under 18 U.S.C. §2518 et seq. and §3504;

2) The Government would not be offering any results of electronic surveillance at defendant's criminal contempt trial. A copy of said letter is attached as Exhibit B hereto.

ARGUMENT

POINT I

THE COURT'S ADJUDICATION UNDER WELL ESTABLISHED SECOND CIRCUIT PROCEDURES, PRIOR TO DEFENDANT'S REFUSAL TO TESTIFY ON PAIN OF CONTEMPT, THAT THE ELECTRONIC SURVEILLANCE WAS LAWFUL FINALLY LITIGATED THIS ISSUE

Defendant is requesting the disclosure of the Order and supporting papers which were the basis for electronic

surveillance so that he may now adjudicate in an adversary context the lawfulness of that electronic surveillance. The prior determination of Judge Lasker is claimed to be inadequate because it was based upon in camera review, and not upon a post-indictment motion to suppress judicially determined after an adversary hearing. Defendant's position fails to recognize that Judge Lasker's determination of the lawfulness of the electronic surveillance without a suppression hearing was in accordance with established Second Circuit procedures, and finally adjudicated, in advance of any Court direction upon pain of contempt, whether defendant could lawfully refuse to testify.

Defendant has been indicted pursuant to 18 U.S.C. § 401(3), which provides as follows:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority,

* * *

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

The indictment specifies that defendant disobeyed and resisted the lawful order to testify issued by the Honorable Lloyd F. MacMahon, United States District Judge, pursuant to the lawful order of the Honorable Inzer B. Wyatt, United States District Judge. The only issues to be resolved at trial are whether the order to testify was lawful, and whether defendant did in fact disobey or resist any lawful order.

When defendant disobeyed Judge MacMahon's order to testify, the Court signed a confinement order pursuant to 28 U.S.C. §1826 (a), which provides:

Recalcitrant witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of --

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months. (Emphasis added).

Gelbard v. United States, 408 U.S. 41 (1972), upon which defendant principally relies, applied 28 U.S.C. §1826(a), and held that a witness before a Grand Jury may invoke as "just cause shown" the prohibitions of 18 U.S.C. §2515 (unlawful electronic surveillance) to defend against civil contempt charges brought because the witness refused to obey a court order to testify.

Gelbard did not specify how (in camera inspection or suppression hearing) or when (contempt proceeding or pre-contempt proceeding) the validity of such a defense should be adjudicated. Id. at 61 n. 22; 70 (White, J., concurring). However, in Giordano v. United States, 394 U.S. 310 (1969), a companion case to Alderman v. United States, 394 U.S. 165 (1969), the United States Supreme Court stated that "a finding by the District Court that the surveillance was lawful would make disclosure and further proceedings unnecessary" (394 U.S. at 313), and J. Stewart, concurring, noted:

Moreover, we did not in Alderman, Butenko, or Ivanov, and we do not today, specify the procedure that the District Courts are to follow in making this preliminary determination. We have nowhere indicated that this determination cannot appropriately be made in ex parte, in camera proceedings. "Nothing in Alderman v. United States, Ivanov v. United States, or Butenko v. United States, ante, p. 165, requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance." Taglianetti v. United States, post, p. 316. Id. at 314.

The United States Court of Appeals for the Second Circuit, in In re Persico, 491 F.2d 1156, 1158-59 (2d Cir.), cert. denied, 419 U.S. 924, rehearing denied, 419 U.S. 1060 (1974), approved the in camera inspection of court orders authorizing the Government's electronic surveillance in order to determine the lawfulness of the electronic surveillance, and stated that the Court can deny defendant's

motions for a suppression hearing and for examination of the court order and accompanying documents. This is how the Court (Lasker, J.) proceeded when defendant Morales sought an evidentiary hearing and disclosure of the order and supporting documents authorizing electronic surveillance.

The Court then properly applied the Second Circuit's standard for deciding whether a witness can justifiably refuse to testify:

We hold that in contempt proceedings initiated when a witness who has been granted "derivative use" immunity refuses to answer questions propounded by a grand jury because he claims he is entitled to a hearing to ascertain whether the questions posed are the product of unlawful electronic surveillance the witness is not entitled to a plenary suppression hearing to test the legality of that surveillance. We hold that the refusal would be permissible only if there is an absence of a necessary court order or if there is a concession from the Government that the surveillance was not in conformity with statutory requirements or if there is a prior judicial adjudication that the surveillance was unlawful. Here there were three court orders. Inasmuch as Judge Judd conducted an in camera inspection to ascertain whether they complied with the statute and found that they did comply, Persico received all that he was entitled to receive. He therefore has no basis for complaint that his motions for suppression hearings were denied. Id. at 1162.

The Court's determination that the court order authorizing electronic surveillance was valid "precludes [the defendant] from further litigating in a contempt proceeding the legality

of that surveillance." In re Millow, 529 F.2d 770, 773 (2d Cir. 1976).*

After being told that the electronic surveillance was lawful, defendant persisted in his refusal to testify. No Fourth Amendment exclusionary rule defenses were available to, or were asserted by, defendant (United States v. Calandra, 414 U.S. 338 (1974)), nor could defendant properly assert any Fifth Amendment privilege because of the testimonial immunity granted by the Court pursuant to 18 U.S.C. § 6003.

The only relevant determination concerning the lawfulness of the electronic surveillance has already been made by Judge Lasker in advance of defendant's refusal to testify under the penalty of contempt. The Government will not be offering any of the results of electronic surveillance at trial, nor do the results of electronic surveillance have any bearing on the factual issues to be tried. Thus, there is no relevant recorded statement of the defendant to be discovered under FRCP Rule 16, or to be suppressed under FRCP Rule 14.

* Defendant's reliance upon People v. Mulligan, 40 A.D. 2d 165, 338 N.Y.S. 2d 488 (1st Dep't 1972) is misplaced. Mulligan, which applied New York State law on electronic surveillance, was written prior to the Second Circuit's In re Persico decision, and dealt with a witness who was not formally apprised that there had been electronic surveillance until after he appeared before the grand jury and after he had been indicted for contempt. Likewise, unlike what occurred in defendant Morales' case, there had been no judicial review of the legality of the electronic surveillance prior to the witness' being directed under the sanction of contempt to testify before the Grand Jury.

CONCLUSION

For the foregoing reasons defendant's motion should be denied in all respects.

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

RICHARD J. McCARTHY
Assistant United States Attorney

- Of Counsel -

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
IN RE LOUIS MORALES,
A WITNESS BEFORE THE
GRAND JURY
-----X

M11-188(42)

MEMORANDUM

LASKER, D.J.

The government moves for an order directing Morales to testify before the grand jury pursuant to an order dated March 24, 1977 signed by Judge Wyatt granting him "use immunity" pursuant to 18 U.S.C. §6002 et seq. Morales resists testifying on the grounds that the questions to be propounded are based on illegal electronic surveillance.

In accordance with the procedures approved in In re Persico, 491 F.2d 1156 (2d Cir. 1974); In re Buscaglia, 518 F.2d 77 (2d Cir. 1975) and In re Millow, 529 F.2d 770 (2d Cir. 1976) the Assistant United States Attorney assigned to this investigation from its inception and the F.B.I. agent in charge of the investigation have submitted affidavits swearing that, except for the electronic surveillance authorized by an order dated February 13, 1976 and signed by Judge Motley,

"the affiant is unaware of the results or existence of any electronic or mechanical surveillance which (1) was directed against LOUIS MORALES; (2) resulted in the interception of any conversations in which LOUIS

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MORALES participated, or (3) was conducted in premises which the witness owned, leased, licensed or otherwise had a proprietary interest."

The agent's affidavit also specifies that his representation is predicated upon his "thorough knowledge of the instant gambling investigation including, but not limited to, an examination of the case files pertaining to this investigation which are maintained by the Federal Bureau of Investigation." These affidavits meet the requirements of 18 U.S.C. §3504 that the government affirm or deny the existence of illegal acts or unauthorized wiretapping.

The electronic surveillance order signed by Judge Motley has been submitted to the court for in camera review, the procedure approved in Millow, supra. Review of the order itself and of the affidavits submitted to her in support of the government's application for the order discloses that the order is facially sufficient and that all statutory requirements were met. Under Millow and Persico, supra, no further hearings or inquiry are appropriate.

Accordingly the witness is directed to testify before the grand jury or be held in civil contempt until such time as he does testify.

It is so ordered.

Dated: New York, New York
April 22, 1977.

MORRIS E. LESTER

U.S.D.J.



ADDRESS ONLY TO
UNITED STATES ATTORNEY
AND REFER TO
FILE NO AND NUMBER

233a

United States Department of Justice

UNITED STATES ATTORNEY

SOUTHERN DISTRICT OF NEW YORK

ONE WT. ANDREW'S PLAZA

NEW YORK, NEW YORK 10007

MDA:jd

May 18, 1977

Arnold Wallach, Esquire
11 Park Place
New York, New York

Re: United States v. Louis Morales
77 Cr. 335(CES)

Dear Mr. Wallach:

This will confirm our telephone conversation today in which I advised you that a pre-trial conference will be held in the above-captioned case on Friday, May 20, 1977, at 11:00 a.m. in Courtroom 506.

At your request I am enclosing transcripts of all of your client's grand jury testimony. This includes appearances on February 24, 1977, March 17, 1977, March 24, 1977 and April 28, 1977. I will give you a copy of the April 28th proceedings before Judge MacMahon as soon as I receive it.

I will not disclose the Orders and supporting papers which authorized the electronic surveillance of your client. As you know, these papers were examined in camera, pursuant to your motion under Title 18, United States Code, Sections 2518, et seq., and 3504, by Judge Lasker who found them to be facially sufficient. (A copy of his opinion is enclosed.) The Government will not be offering any results of electronic surveillance at the trial of the above-captioned matter. Hence, apart from the correctness of Judge Lasker's decision which ordered Morales to testify, the legality of that electronic surveillance which might have been used to question your client had he testified before the grand jury as he was lawfully required to do by Judge Wyatt's Order granting him testimonial immunity and Judge Lasker's decision, will obviously not be an issue. Therefore, under the

Exhibit B

Federal Rules of Criminal Procedure, you are not entitled to discovery of the documents authorizing such surveillance nor an evidentiary hearing to litigate whether it was properly executed.

Very truly yours,

ROBERT B. FISKE, JR.
United States Attorney

By:

MICHAEL D. ABZUG
Assistant United States Attorney

Enclosures.

cc: Honorable Charles E. Stewart
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORKCrown's Ex.
1
7/11/77

----- x
IN RE LOUIS MORALES, :
A WITNESS BEFORE THE : ORDER
GRAND JURY :
----- x

On the application of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, filed in this matter on March 24, 1977

And it appearing to the satisfaction of the Court:

1. That LOUIS MORALES has been called to testify before the Grand Jury of the United States presently empaneled within this District; and

2. That LOUIS MORALES is a target of the Grand Jury inquiry and, therefore, it is likely that he will refuse to testify on the basis of his privilege against self incrimination; and

3. That in the judgment of the said United States Attorney, the testimony from said LOUIS MORALES may be necessary to the public interest; and

4. The aforesaid application filed herein has been made with the approval of the Assistant Attorney General in charge of the Criminal Division of the Department of Justice, pursuant to the authority vested in him by Title 18, United States Code, Section 6003 and 28 C.F.R. § 175:

NOW, THEREFORE, it is ordered pursuant to Title 18, United States Code, Section 6002, that the said LOUIS MORALES give testimony which he refuses to give on the basis of his privilege against self incrimination as to all matters about which he may be interrogated before said Grand Jury, and it is further ordered that no testimony or other information compelled hereunder, or

any information directly or indirectly derived from such testimony or other information, may be used against the said LOUIS MORALES in any case, except a prosecution for perjury, giving a false statement or otherwise failing to comply with this Order.

JBW This Order shall become effective only if after the date of this Order the said LOUIS MORALES refused to testify or provide other information on the basis of his privilege against self-incrimination.

Dated: New York, New York

March 24, 1977

Irving B. Wyatt
UNITED STATES DISTRICT JUDGE

237a

TESTIMONY OF DEFENDANT BEFORE GRAND JURY

UNITED STATES GRAND JURY

SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA :

-v- :

ANTHONY SALERNO :

-----x

United States Court House
Foley Square
New York, New York

April 28, 1977
2:08 PM

APPEARANCES: Michael D. Abzug, Esq.

Assistant United States Attorney

Ann Dule
Acting Grand Jury Reporter

NATIONAL REPORTING INC.

CERTIFIED SHORTHAND REPORTERS

FIVE WORLD TRADE CENTER

NEW YORK, N. Y. 10048

[212] 466-1280

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1
2 L O U I S M O R A L E S, called as a witness, having
3 been duly sworn by the Foreman of the Grand Jury, testi-
4 fied as follows:

5 BY MR. ABZUG:

6 Q State your name and spell your last name, please.

7 A Louis Morales, M-o-r-a-l-e-s.

8 Q Where do you currently reside?

9 A 1954 First Avenue.

10 Q Mr. Morales, you've appeared before this Grand Jury
11 a number of times, and as I advised you on prior occasions,
12 you've been subpoenaed before this Grand Jury in connection
13 with a Grand Jury investigation into alleged violations of
14 the federal laws, specifically those laws forbidding syndi-
15 cated gambling, conspiring to do so. The Grand Jury is in-
16 terested in the illegal activities of men known to you as
17 Anthony Salerno also known as Fat Tony Salerno, Vincent Cafaro
18 also known as Fish, Cirino Salerno also known as Speed and
19 others as they occurred in the East Harlem area during 1975
20 and 1976.

21 Now, when you appeared before the Grand Jury on March
22 24, 1977, you were shown an order granting you testimonial
23 immunity. It was marked in evidence as Grand Jury Exhibit
24 Number 1. Correct?

25 A Yes.

1
2 Q Now, this order I believe was explained to you and
3 read to you. I'll read it once more.

4 "Now, therefore, it is ordered pursuant to Title 18,
5 United States Code, Section 6002 that the said Louis Morales
6 give testimony which he refuses to give on the basis of his
7 privilege against self-incrimination as to all matters about
8 which he may be interrogated before said Grand Jury, and it
9 is further ordered that no testimony or other information
10 compelled hereunder or any information directly or indirect-
11 ly derived from such testimony or other information may be
12 used against the said Louis Morales in any case except a
13 prosecution for perjury, giving a fals- statement or other-
14 wise failing to comply with this order."

15 That was signed on March 24th, 1977, by Judge Wyatt.

16 Subsequently, he refused to testify and he raised certain
17 legal defenses before Judge Lasker. On April 22, 1977, Judge
18 Lasker filed an opinion which I'm marking as Grand Jury
19 Exhibit Number 1. (So marked.)

20 Q Overruling those legal defenses. The last paragraph
21 states accordingly, "The witness is directed to testify be
22 fore the Grand Jury or be held in civil contempt until such
23 time as he does testify."

24 Now, you understand now your obligations, Mr. Morales?

25 A I do.

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2 Q You're either to testify pursuant to Judge Wyatt's
3 order of immunity or the Government will make an application
4 to have you held in civil contempt pursuant to Title 28,
5 United States Code, Section 1826A. I also wish to warn you
6 that in addition to subjecting yourself to civil contempt,
7 you might also be indicted for criminal contempt. Do you
8 understand that?

9 A I do.

10 Q If you're cited for civil contempt, you will remain
11 in jail for the life of this Grand Jury which expires on
12 March 14, 1978, subject to three six month extensions.

13 Knowing all that, sir, I ask you whether you know a man
14 by the name of Vincent Cafaro?

15 A Respectfully decline to answer the question on the
16 grounds that it would tend to incriminate me.

17 Q Have you ever worked in a policy operation with Vin-
18 cent Cararo?

19 A I respectfully decline to answer the question on the
20 grounds that it would tend to incriminate me.

21 Q Have you ever discussed a policy operation supervised
22 by Anthony Salerno at 2226 First Avenue?

23 A I respectfully decline to answer the question on
24 the grounds that it would tend to incriminate me.

25 Q You understand that under the terms of Judge Wyatt's

1
2 order, your testimony cannot be used against you except for
3 prosecution for perjury?

4 A I understand.

5 Q And knowing that, Mr. Morales, you're still refusing
6 to testify?

7 A I do.

8 MR. ABZUG: Mr. Foreman, will you direct the witness
9 to answer the questions I've posed to him?

10 THE FOREMAN: I so direct.

11 THE WITNESS: I respectfully decline to answer the
12 question on the grounds that it would tend to incriminate
13 me.

14 MR. ABZUG: Mr. Morales, I'm going to adjourn these
15 proceedings. The Government will make an application
16 to have you held in civil contempt.

17 Will you excuse the witness, please?

18 THE FOREMAN: You're excused, sir.

19 (Witness excused.)
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21
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O Gort's Ex.
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nlulm

jgm PROCEEDINGS BEFORE JUDGE McMAHON

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

IN RE:

GRAND JURY MATTER OF:

M-11-188

LOUIS MORALES

-----x

B e f o r e :

HONORABLE LLOYD F. MacMAHON,

District Judge.

New York, New York
April 28, 1977 - 2:15 p.m.

APPEARANCES:

MICHAEL B. ABZUG, ESQ.
Assistant U. S. AttorneyARNOLD E. WALLACH, ESQ.
Attorney for Louis Morales

10 THE COURT: You understand, don't you,
11 Mr. Morales, that you have been given immunity for anything
12 you might say that would tend to incriminate you before the
13 Grand Jury?

14 MR. MORALES: I do.

15 THE COURT: You understand also that you have
16 been ordered by the Court to answer the questions that
17 have been put to you?

18 MR. MORALES: I do.

19 THE COURT: And those questions were put to
20 you this morning and you refused to answer, is that correct?

21 MR. MORALES: Yes.

22 THE COURT: And you did that intentionally?

23 MR. MORALES: Yes.

24 THE COURT: Notwithstanding and with the full
25 knowledge of the fact that the Court had ordered you to do it?

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MR. MORALIS: That is right.

THE COURT: You did that on purpose and are not laboring under any mistake or anything of that nature?

MR. MORALES: I know what I was doing.

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245a
PROCEEDINGS BEFORE JUDGE LASKER

Court Exhibit
1

7/11/77

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 ----- x

4 In re :

5 LOUIS MORALES, : M 11 - 188 (42)

6 a witness before the Grand :
7 Jury. :

8 ----- x

9 April 6, 1977,
10 A.M.

10 Before:

11 Hon. Morris E. Lasker,
12 District Judge.

13 Appearances:

14 ROBERT B. FISKE, JR.,
15 Attorney for the Southern District of New York,
Michael Abzug, Assistant U.S. Attorney.

16 ARNOLD E. WALLACH, ESQ.,
17 Attorney for Louis Morales.

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MR. ABZUG: Your Honor, this is an application for an order to show cause why a witness before the Grand Jury by the name of Louis Morales should not be ordered to comply with an order granting him testimonial immunity that was issued by Judge Wyatt on March 24, 1977, and very briefly the facts are these: On March --

THE COURT: You don't need to state them all over again. They are listed in your voluminous papers which I have read three-quarters of, and I think I understand very well.

MR. ABZUG: Then I rely on my papers, your Honor.

MR. WALLACH: Judge, firstly, I would like to go into the issue of the order of immunity.

Notwithstanding the Ullman case, which is of long standing, over here the chain of events is as follows:

Mr. Fiske made an application to the Department of Justice so that he could apply for an order of immunity. Nothing in the application states what they are investigating, absolutely nothing.

Mr. Thornberg, I believe, is that the gentleman?

THE COURT: Let me take a look and see what you are claiming it should have been.

Were any of these propositions put to Judge Wyatt?

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MR. ABZUG: No! The order was submitted to Judge Wyatt ex parte, your Honor, for signature.

THE COURT: I see. Okay. As far as I know, Mr. Fiske didn't apply. It was Mr. Aronwald, was it not? I mean at least the letter is addressed to Mr. Aronwald.

MR. ABZUG: Correct. The actual procedure, your Honor, is that I make an application to the Department of Justice down in Washington, which is reviewed by my then-boss, Mr. Aronwald, and then it is processed in Washington, and Mr. Thornberg sends Mr. Fiske a letter authorizing him to apply to the District Court.

THE COURT: Is the letter of application in these papers? I can't remember.

MR. ABZUG: No, it is an internal document. I didn't put it in.

THE COURT: So how do you know what it said or didn't say?

MR. WALLACH: I don't know about that letter, but I do know the successful product of this application was a letter from Mr. Thornberg saying that, "Go ahead and apply," but apply to give him immunity for what? It is just a generality. The order of Judge Wyatt says anything that

THE COURT: The order of Judge Wyatt, yes, but you

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keep shifting grounds. First of all you said that Mr. Fiske didn't specify to the Department of Justice what the scope of the immunity was to be. Then I think you said that the order didn't say so or the Department of Justice. Now, what is it you are complaining about?

MR. WALLACH: I am saying that neither of them, neither the order of Judge Wyatt or the consent from the Department of Justice --

THE COURT: Let me take a look. Have you looked at the consent of the Department of Justice?

MR. WALLACH: Yes.

THE COURT: Certainly the document signed by the Attorney General on February 13, 1976 -- I think it is February 13th.

MR. WALLACH: January 13th.

THE COURT: No, February 13th I am talking about, Edward Levy, specifies quite clearly where the interception is to apply, and we are talking now about the immunity, is that right?

MR. WALLACH: That's right, your Honor.

THE COURT: All right. Let me get to that.

MR. WALLACH: January 13, 1977.

THE COURT: Are there documents in here?

MR. ABZUG: They are attached as Exhibit A to my

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2 affidavit. They are about three to four pages from the
3 first document in your papers, your Honor. That begins
4 with the order, I believe, right there, granting the im-
5 munity.

6 THE COURT: No, it is Harriman's affidavit first.
7 Now is the order. But I am talking about the underlying
8 papers. They are under that, right?

9 MR. ABZUG: Right. Mr. Fiske's application
10 to Judge Wyatt is attached and my affidavit to Judge Wyatt
11 is attached as well as the letter of authorization
12 authorizing Mr. Fiske to make the application.

13 THE COURT: Well, looking at these papers now,
14 I think that Mr. Wallach is correct -- although I am not
15 saying that is relevant -- he is correct, is he not, that
16 neither your application nor Mr. Fiske's letter nor Mr.
17 Thornberg's letter specifies the offenses that were being
18 investigated.

19 MR. ABZUG: I agree with your Honor. He is correct,
20 but it is irrelevant, because under Kastigar -- well, for
21 two reasons, I would submit, your Honor. First of all,
22 the scope of the investigation was quite clearly defined
23 to Mr. Morales in the Grand Jury when he appeared. Mr.
24 Morales was advised of the limited scope.

25 THE COURT: I don't think that is the point Mr.

Wallach is making or not the point I would make if I were arguing his case.

He knew what it was all about.

MR. ABZUG: The second point, your Honor, and more to the point is that under Kastigar, as you well know--

THE COURT: Are you saying I well know because you know I well know? I had a matter with a Task Force in which I had back and forth about Kastigar for two years, yes.

MR. ABZUG: Well, in any event, your Honor, you are familiar with the case, and it holds that the order of immunity pursuant to Section 6002 was coextensive with Mr. Morales' Fifth Amendment privilege, so that really a claim of over-breadth, which is, I guess, what he is raising, is irrelevant since the order is coextensive with his Fifth Amendment privilege.

THE COURT: Right. All right, what other complaints do you have, Mr. Wallach?

MR. WALLACH: Can I finish, Judge?

THE COURT: Yes, I am asking you.

MR. WALLACH: Oh. On this particular phase of the opposition, I mean.

THE COURT: All right, what else do you want to say?

MR. WALLACH: Well, except this, as I read Ullman,

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where this issue was raised, and the issue was that a court, without having an adversary proceeding, with this type of arrangement where they apply ex parte and the court approves and that is the end of the Fifth Amendment claim, I would like to suggest that this is interfering with his privacy because it didn't specify they are investigating 18 USC 371 in 1955.

According to this order they can ask him next in the Grand Jury, "When did you beat your wife?"

They can ask him, "Did you violate the Mann Act?"

And they can go through every one of these sections in Title 18.

Now, no matter how liberal one is in reading the Ullman case -- that is liberal to the government -- I don't think the Ullman case held that.

THE COURT: Let me say this: if it comes to that, I will protect him against that.

MR. WALLACH: I'm sorry about that but, all right-- however, except this, Judge, that I think this is jurisdictional and therefore it should be applied.

THE COURT: I understand you are wishing to make these comments for the record, but I don't believe that they are, to be perfectly frank, and three of us, including myself, have now spent time on this proposition,

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and if there is anything that is really significantly in error here I, of course, will be glad to act on it, but if it is just scratching around to see whether there is some possible technical defect, I have noticed none. I have examined these papers with care and I believe I understand the law in this area, and I am prepared to grant the application of the government.

Now, I don't know what Mr. Morales is going to do.

MR. WALLACH: I didn't finish.

THE COURT: Well, finish, then, Mr. Wallach. I have to go downstairs to court.

MR. WALLACH: I have the wiretapping issue. He cited Milow which he won in the Circuit Court, and he cited Persico.

Now, Mr. Morales, I doubt --

THE COURT: You say you have the wiretapping issue. There is such a thing in the law as a wiretapping issue. What do you mean by saying --

MR. WALLACH: I'm relying on Gelbard.

THE COURT: What evidence do you have? I have no papers before me. You come in and say, "I am relying

MR. WALLACH: The wiretap was raised before the

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2 Grand Jury. Mr. Abzug, I believe, acknowledged that
3 there were electronic surveillance applications here that
4 were granted. He has acknowledged there was electronic
5 surveillance.

6 Of course, I can't say the orders authorizing
7 it are invalid. I haven't seen them.

8 THE COURT: What do you say?

9 MR. WALLACH: I thought he was going to submit
10 these orders for an in camera inspection by your Honor.

11 THE COURT: I just finished saying whatever has
12 been said to me I find to be regular on its face.

13 MR. WALLACH: May I suggest to your Honor, then,
14 that not only with regard to probable cause, which I can't
15 argue, there is a question of sealing. I don't know whether
16 they have submitted sealing orders to your Honor, and I
17 will be very frank about it, Mr. Morales was not served
18 with a notice.

19 Now, I have read Donovan, of course, and I don't
20 know whether he was named in those things-- I don't know
21 whether he should have gotten a notice, and I raise that
22 issue also.

23 I would also raise the general issue that I consider
24 all wiretapping unconstitutional, but I am not going to
25 waste your time with that any more.

I don't know whether they minimized, as I understand electronic surveillance, in a room.

THE COURT: Let me say this: I am not going to spend the precious time of this court, which has obligations to many, many thousands of people, to investigate any possible proposition that might be defective in this without some threshold showing on your part that there was a reason to believe that there is anything wrong. I will take the representations of the government on that proposition, and if you wish to appeal, you may.

MR. WALLACH: Well --

THE COURT: Now, if you want to specify in affidavit form anything which you have a reason to believe should cause a hearing to be held or a further investigation by the court to be made, I will give you two days in which to put such material before me.

MR. WALLACH: All right, Judge. That's that, I guess.

THE COURT: All right. What is today, Wednesday?

MR. ABZUG: Yes, your Honor.

THE COURT: Let's say by -- I'd like to have any answering papers, in other words, and tailored to what I have just said, by Friday afternoon at 4 o'clock.

MR. WALLACH: All right.

Your Honor, the only thing -- I am not trying

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2 to delay; I know you are in a hurry -- next week I will
3 be away. I will be actually engaged in Schenectady.

4 THE COURT: That's why I asked you to do it before.

5 MR. WALLACH: I will do it before Friday, Judge,
6 but in case there is an adverse determination, I will be
7 away for a week and I won't be able to surrender him and
8 everything else.

9 Now, I know that the government wants him in if
10 I am defeated, but I am asking your Honor for that indulgence.
11 If he goes away --

12 THE COURT: Mr. Abzug, what is your timing on this?
13 You have got so many characters here.

14 MR. ABZUG: Well, your Honor, I had a conversation
15 with Mr. Wallach in which he indicated to me that Mr. Morales,
16 if your Honor ruled adversely on his claim, would persist
17 in his refusal to testify pursuant to Judge Wyatt's order.
18 That's correct, is it not?

19 MR. WALLACH: Yes.

20 MR. ABZUG: Based on that representation, and
21 assuming your Honor made an adverse ruling on his claim
22 on Friday, I would make a motion to have him held in
23 contempt and remanded within three days. That would give
24 him the weekend to get his affairs in order and have him
25 surrender on Monday.

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I don't think it is necessary for Mr. Wallach to be there at the surrender. Ordinarily the man just shows up in room 506 and surrenders into the custody of the marshal.

THE COURT: Are you going to allow him to surrender, then, or get a stay from the Court of Appeals or what? I don't know why we act as if I have made up my mind. I haven't. I want to see what Mr. Wallach says, but it is a possibility, of course.

MR. WALLACH: Judge, let me suggest this: I am going away Monday afternoon or Tuesday morning. Number 2, outside of asking for one adjournment for his appearance, I never asked for any other adjournments.

Three, it is Easter Sunday. I am not religious, I will be frank, but --

THE COURT: And you are not Christian either.

MR. WALLACH: Oh, that's right, but the point is--

THE COURT: We have had our Passover already.

MR. WALLACH: He has told Mr. Abzug that his daughter is having a communion a week from this Sunday. If he goes in, it is going to be for the life of the Grand Jury, Judge. He doesn't get good time.

THE COURT: How long does this Grand Jury run?

MR. ABZUG: September, '78. As you mentioned,

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2 this all may be premature, but since you brought it up,
3 this is what I told Mr. Wallach and Mr. Morales, that
4 assuming your Honor held him in contempt on Friday, and
5 assuming that you consented to have him surrender on Monday,
6 that I would not oppose having him let out on furlough
7 by MCC to attend his daughter's communion.

8 I am not being unreasonable, but at the same
9 time, if he does persist in refusing to testify pursuant
10 to Judge Wyatt's order, he is in contempt of court and
11 I think --

12 THE COURT: There is no doubt about that, but
13 that is not a worse crime than many another crime in which
14 I allow somebody a little bit of time before they go to
15 prison.

16 Furthermore, just since we are all thinking
17 out loud, I am not sure that the MCC itself wouldn't prefer
18 simply to have a man come in than have a man come in, go
19 out and then come back in again, because that means they
20 have two or three entrances.

21 Without making light of it, this is detail, let's
22 get the decision made and then we will see.

23 MR. ABZUG: Thank you, your Honor.

24 MR. WALLACH: I don't want to burden you. Will
25 if I am away next week and a decision comes down?

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THE COURT: We will have to play it by ear.

At the present time I am inclined to make some reasonable arrangement for Mr. Morales unless Mr. Abzug persuades me that it is some kind of an emergency.

MR. WALLACH: Thank you very much, your Honor, and have a nice holiday. I will send that affidavit in.

THE COURT: All right, fine.

--

STIPULATION OF COUNSEL

11-1587
11-3069

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Court Exhibit
2

-----x
UNITED STATES OF AMERICA :

-v- :

STIPULATION

LOUIS MORALES, :

77 Cr. 335 (CES)

Defendant. :
-----x

It is hereby stipulated and agreed by and between the defendant, Louis Morales, by his attorney, Arnold E. Wallach, and the United States of America, by its attorney, Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, as follows:

1. The Order which is Government Exhibit 1 is a true copy of the Order signed by Judge Inzer B. Wyatt in In re Louis Morales, A Witness Before the Grand jury, and marked as Grand Jury Exhibit 1 dated March 24, 1977.

2. If called as witnesses at the trial herein, the appropriate grand jury reporter, acting grand jury reporter, or court reporter for the Southern District of New York will testify essentially as follows:

(a) That he or she was the grand jury reporter, acting grand jury reporter, or court reporter who prepared the stenographic minutes during the appearances of Louis Morales before the Grand Jury in the Southern District of New York on April 28, 1977, or who prepared the stenographic minutes of the hearing before the Honorable Lloyd F. MacMahon on April 28, 1977, in In re Grand Jury Matter of Louis Morales, M-11-188.

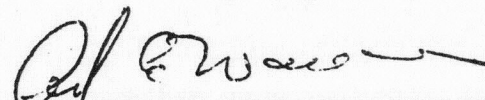
(b) That he or she examined the transcript of the stenographic minutes taken during the course of said grand jury appearance and said hearing.

(c) That Government Exhibit 2 is an accurate copy of the stenographic transcript of the testimony given by Louis Morales before the Grand Jury on or about April 28, 1977.

(d) That Government Exhibit 3 is an accurate copy of the stenographic transcript of the testimony given by Louis Morales at a hearing before the Honorable Lloyd F. MacMahon on or about April 28, 1977.

Dated: New York, New York

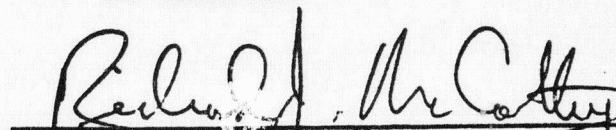
July 7, 1977



ARNOLD E. WALLACH
11 Park Place
New York, New York 10007
Attorney For Defendant
Tel: (212) 227-0959

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
Of America

By:



RICHARD J. MCCARTHY
Assistant United States Attorney
One St. Andrew's Plaza
New York, New York 10007
Tel: (212) 791-1977

FRANKEL

STATE OF NEW YORK)
 : SS.
COUNTY OF RICHMOND)

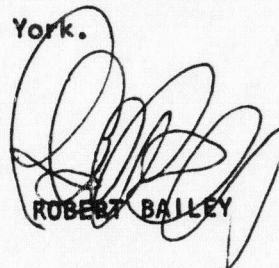
ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 16 day of Sept. 1977 deponent served the within Appendix upon

U.S. Atty. So. Dist. of Ny

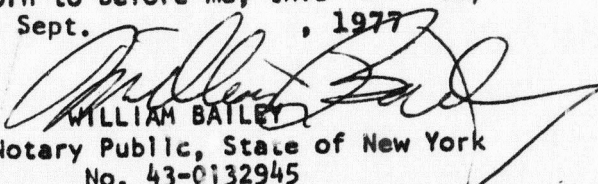
attorney(s) for
Appellee

In this action, at
1 St. Andrews Pl., NYC

the address(es) designated by said attorney(s) for that purpose by depositing
1 copies of same enclosed in a postpaid properly addressed wrapper, in an
official depository under the exclusive care and custody of the United States
post office department within the State of New York.


ROBERT BAILEY

Sworn to before me, this 16 day
of Sept. , 1977


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978